Decision **DRAFT DECISION OF ALJ PULSIFER (Mailed 1/25/2005)**

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

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| Order Instituting Rulemaking Regarding the Implementation of the Suspension of Direct Access Pursuant to Assembly Bill 1X and Decision 01-09-060. | Rulemaking 02-01-011 (Filed January 9, 2002) |

# OPINION REGARDING PETITION FOR MODIFICATION OF DECISION 03-04-030

On March 23, 2004, California Large Energy Consumers Association (CLECA) and California Manufacturers and Technology Association (CMTA), jointly filed a Petition for Modification (Petition) of Decision (D.) 03-04-030 (the Customer Generation Departing Load (CGDL) decision). By this decision, we resolve the Petition.

## I. Position of Petitioners

In D.03-04-030, the Commission established policies and rules governing the applicability of Cost Responsibility Surcharge (CRS) obligations to bundled service customers that depart to "Customer Generation" or self-generation. Among other things, the Commission determined that ongoing California Department of Water Resources (DWR) power procurement costs would not be recovered from the first 3,000 megawatts (MW) of new customer generation departing load. D.03-04-030 was silent on the question of whether, or to what extent, direct access (DA) customers that move to self-generation must still pay the power charge component of the CRS obligation.

Petitioners argue that the Commission's silence on this question makes customer planning very difficult. Petitioners argue that customers cannot make rational business decisions to invest capital in new generation unless the CRS they have to pay is clearly known. Further, if they must carry with them substantial CRS undercollection liability, based largely on DWR long-term power costs, they may decide that self generation is not economic. Therefore, Petitioners argue, the Commission should remove the disincentive for DA customers to invest in self generation by affirming that the CRS, including any undercollection from DA customers of DWR long-term power costs, does not apply to DA customers migrating to self generation. On this basis, CLECA and CMTA seek modification of D.03-04-030.

DA customers who entered into a contract for DA service no later than September 20, 2001, do not consume DWR long-term contract power and yet pay a portion of such DWR power costs. Petitioners argue that CRS is imposed solely on the foundational premise that the DWR entered into long-term power contracts with the expectation that such customers would be bundled service customers and would, in fact, receive and consume the power. Because that premise is removed in the case of those DA customers who move to self generation and qualify among the initial 3,000 MW, Petitioners believe there is no basis to require such DA customers to contribute to the costs of ongoing DWR power costs (as distinguished from the collection of the initial nine-month shortfall through the bond charge). Because they do not currently use such power and it was not purchased on their behalf, Petitioners argue that they should not be held liable for its costs.

Petitioners argue that bundled service customers are distinguishable from DA in their liability for DWR power supplies because they, unlike DA customers,

actually receive and consume such power. Petitioners argue that Assembly Bill No. 1 from the First Extraordinary Session (AB 1X) (See Stats. 2001, Ch. 4), which authorized the DWR to enter into such supply contracts, required that the obligation to pay for the costs of such power runs directly from the consumer who receives and consumes it to the DWR as supplier.[1]

## II. Responses to the Petition

Responses to the Petition were filed on April 22, 2004, by Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), and San Diego Gas & Electric Company (SDG&E). Responses were also filed by The Utility Reform Network (TURN), the Office of Ratepayer Advocates (ORA), and THUMS Long Beach Company (THUMS). A joint response in support of the Petition was also filed by Distributed Energy Strategies, Real Energy, Northern Power Systems, Equity Office Properties, and Sonnenblick Del Rio. On May 3, 2004, Petitioners filed a reply to the responses in opposition to their Petition.

SDG&E supports the Petition as a general matter, contingent on recognition that (1) "continuous DA" customers[2] would not be affected by the modifications, and (2) customers that are exempt from the power charge would continue to pay the DWR Bond Charge, as determined by D.02-11-022. SDG&E further states that it cannot provide individuals with a customer-specific undercollection amount, because doing so would be infeasible and inconsistent with its Commission-approved tariff. SDG&E does not view the Petition as

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[1] *See* Water Code Sections 80104 and 80110.

[2] "Continuous" DA customers refers to those customers that were taking DA service prior to February 1, 2001, and continued to take DA service after that date.

requesting that a DA customer migrating to CGDL be excused from any previously incurred liability for ongoing DWR power charges. SDG&E opposes retroactive waiver of past DA CRS undercollections, but supports the proposed exemption on a going forward basis

PG&E, SCE, ORA, and TURN oppose the Petition. These parties assert that the modification would be a substantive change in Commission rules for calculating DA CRS that would upset the balance of interests embedded in the several CRS-related decisions issued to date. They argue that the proposed modification would be unfair to DA customers who remain on DA status and to bundled customers who move to self generation. They assert that the petition is based on the false premise that DA customers who move to self generation did not actually use DWR power, and that the requested modification might actually create an incentive to migrate to self generation

PG&E argues that the proposed modification would create an inconsistency in treatment between DA customers who move to self generation and DA customers who return to bundled service.[3] The CRS undercollection liability, if any, is created while the customer uses the DA option, and the Commission has held that such liability follows the customer if it returns to bundled service. PG&E argues that this liability should not be avoided through DA movement to self generation while being retained in the case of DA movement to bundled service.

TURN argues that the proposed modification has no support in the record of this proceeding and would create invidious discrimination as between former

[3] PG&E, at p. 3.

bundled service and former DA customers who install self-generation. TURN further argues that the modification would shift costs to other DA customers who do not self-generate and would create perverse incentives for customers considering self-generation to delay such projects until the DA CRS cap undercollection reaches its highest point

TURN argues that **past** DA CRS obligations accrued by such customers as a result of the CRS cap are a "loan" that must be repaid to bundled service ratepayers in the future, and that cannot be forgiven entirely if the DA customer installs self-generation. While the Commission already offers a self-generation incentive program, the proposal here would be far more lucrative than the incentives offered under the formal program.

If the Commission is inclined to consider the modification, TURN argues that evidentiary hearings must be held on the issue because nothing in the record of this proceeding has suggested such a retroactive forgiveness of already accrued DA CRS liabilities. For this Commission to entertain such a proposal, TURN argues, would undermine the credibility of CPUC decisions, and irreparably destroy "regulatory consistency."

TURN argues that CLECA/CMTA do not seek a modification of D.03-04-030, but rather, adoption of an entirely new and untested concept. The potential dollar impact of the proposal, however, and the incentives that such a policy would create, have not been examined. If former DA customers who install on-site generation are excused from the DWR power charges associated with their **past** consumption, then bundled service customers who later self-generate would likewise be entitled to a refund of the above-market DWR costs that they paid while taking bundled service.

ORA argues that granting the Petition would: (1) upset the balance that the Commission struck when it settled on a 2.7 cents/kWh DA CRS cap; (2) make remaining DA customers unfairly pay some of the DWR costs that should be paid by departing DA customers; (3) increase the risk that ratepayer indifference will not be maintained; (4) allow DA to escape paying its fair share of DWR costs by incorrectly applying the findings behind the 3,000 MW exemption on CGDL surcharges; and, (5) give DA that moves to CGDL a windfall, while forcing bundled ratepayers to play by the rules and pay all the DWR costs the departing customer incurred prior to moving to CGDL. ORA argues that customers who leave the DA program should be required to pay the undercollection for the time period that they were DA customers. ORA does not believe any potential benefit of moving to CGDL should be available until the customer actually becomes a CGDL customer and is accepted under the Commission's 3,000 MW cap. At that time, such a customer would not be required to pay ongoing DWR costs, but should still pay for past undercollections of DWR costs.

If DA migration to self generation occurred in large numbers, the burden on remaining DA customers could become quite large. ORA expresses concern that if they were unable to repay that undercollection, bundled ratepayers would not be fully compensated. Failure to fully compensate bundled ratepayers for the monies they are currently advancing DA to finance DA's CRS under collection or delaying this repayment would result in harm to bundled ratepayers, rather than maintaining ratepayer indifference.

Though the Commission's adopted tracking mechanism splits the responsibility for financing the undercollection between core and non-core DA sectors defined in D.03-07-030, uncollectibles are not maintained within those defined classes. (See D.03-07-030, pp. 87-90.) Thus there is the potential for all

bundled customers to bear the burden created by this Petition if remaining DA customers are unable to absorb the CRS undercollection.

ORA also argues that granting the petition would create an incentive for increased migration to self generation.[4] Petitioners respond that assuming ORA is correct, such an increased incentive would be a good thing given the State's policy in favor of self generation and the Commission's adoption of favorable treatment for various forms of self generation.

## III. Discussion

In determining the extent to which CRS obligations should apply to DA customers that migrate to customer generation, we must abide by the prohibitions against cost shifting as set forth in AB 117. Under the provisions of this legislation, each group of customers is to bear their fair share of costs associated with DWR procurement, and there is to be no unfair cost shifting from one group of customers to another.

In addressing the cost shifting effects of the Petitioners' proposed modification, a distinction should be made between past CRS undercollections accrued prior to the customer's migration versus prospective charges after the migration occurs. We conclude that DA customers must remain responsible for their share of DA CRS undercollections that have accrued up to the point in time of migration to Customer Generation status.

On the other hand, we conclude that it is consistent with the intent of D.03-04-030 for customers migrating from DA to self generation not to be required to pay an ongoing DWR power charge associated with prospective

[4] ORA, at p. 5.

costs. While those customers remain responsible for their share of past DA CRS undercollections incurred during the period that they were on DA, such customers do not contribute to the incurrence of ongoing CRS power charges after they migrate to self generation and otherwise qualify as part of the 3,000 MW of excluded load. On that basis, no impermissible cost shifting results if those customers no longer pay a DA CRS component for ongoing power charges attributable to the period after the customer's migration to self generation.

We shall therefore grant the petition for modification to the limited extent of relieving such customers from the obligation to pay the ongoing power charge component of CRS on a prospective basis. We deny the petition, however, to the extent it seeks to relieve migrating DA customers of past CRS undercollections. DA customers migrating to self generation shall continue to be responsible for past CRS undercollections for DWR power charges, as well as for DWR bond charges, on the same basis as before the migration occurred. "Continuous" DA customers do not pay DWR power charges and are thus not impacted by this modification.

We disagree with petitioners' argument that there is no liability for DWR long-term power costs for customers migrating from DA to self generation because the DWR did not enter into such contracts on behalf of such customers. On that premise, Petitioners argue that the modification would not shift the liability to the remaining DA customers nor extend the repayment period. Petitioners deny that such DA customers "default" on their CRS undercollection liability by redefining the liability to exclude DWR long-term power costs. Petitioners thus characterize the requested modification as reducing the aggregate undercollection liability of all DA customers. Likewise, Petitioners

deny there would be a cost "shift" to bundled service customers because their liability for DWR costs is the total DWR procurement cost allocated to their serving utility less payments made by DA customers under the indifference element of the CRS.

We find petitioners' arguments unpersuasive. Petitioners argue that a DA customer's migration to self generation warrants different treatment than a return to bundled service because one consumes DWR power while the other does not. Petitioners argue that because a DA customer returning to bundled service consumes DWR power, such action affirms the Commission's earlier determination that DWR entered into the contracts on the customer's behalf. Petitioners argue, however, that the DA customer that moves to self generation makes clear by its move that it is among the 3,000 MW of load for which the DWR did not enter into contracts. Petitioners claim that by its move, the customer eliminates the rationale for holding it liable for such DWR long-term contract costs.

Yet, the DA CRS undercollection is predicated on past procurement actions. The cost effects of those past procurement actions do not disappear by a subsequent migration from DA to self generation. Moreover, an individual DA customer does not eliminate or reduce the aggregate DA CRS undercollection in stranded procurement costs by virtue of a subsequent move to self generation.

DA cost responsibility is predicated on whether power supplies were *procured* on behalf of a given customer load, even if the supplies were not actually *consumed* by that load. DWR power was purchased, in part, to serve the customers on bundled service at the time of DWR's purchasing activities that subsequently migrated to DA. Under the provisions of the CRS, DA customers thus bear responsibility for the above-market component of DWR power even

though they do not actually consume the power. If such a DA customer subsequently migrates its load to self generation without paying its fair share of accrued CRS undercollections for those above-market costs, that share of the undercollection must be paid off by the remaining customers. If bundled customer indifference is to be maintained, the remaining DA customers would have to absorb the undercollection left unpaid by the migrating customer. In this manner, however, such costs would be unfairly shifted to the remaining DA customers, since such stranded costs cannot be recouped in the marketplace. Either the CRS cap would have to be raised, or the DA CRS payback period extended to make up the lost share of undercollection that would go unpaid by the DA customer migrating to customer generation. On the other hand, if remaining DA customers do not absorb that share of DA undercollection left unpaid, then those unpaid costs would be shifted to bundled customers. Such an outcome would be not only unfair to bundled customers, but would result in impermissible cost shifting. Selective forgiveness of these past costs for one group of DA customers and not for similarly situated groups would also constitute unlawful discrimination.

THUMS responds to the portion of the Petition requesting clarification of the level and basis for the IOUs' tail CTC costs for each year, beginning in the fourth quarter of 2001. THUMS understands that this question does not apply to CGDL. THUMS contends that no balancing account has been established to track tail CTC for Customer Generation for the post-October 1, 2001 period. THUMS argues that the requirement for notice and the bar on retroactive ratemaking prohibit imposition of tail CTC on CGDL customers for 2001-2002 and 2003. Without such notice and balancing account treatment, THUMS argues,

accrual and assessment of tail CTC on CGDL customers for these periods is forbidden.

THUMS is incorrect in its claim that the bar of retroactive ratemaking prohibits imposition of tail CTC on CGDL for 2001-2002. Retroactive ratemaking has nothing to do with the CGDL obligation for tail CTC which merely involves an allocation of costs that have been previously mandated for recovery by statute. D.03-04-030 set forth the requirements of CGDL for payment of tail CTC, consistent with applicable statutory provisions. CGDL requirements for tail CTC have previously been implemented by Commission Resolution E-3831, dated July 8, 2004, and as further modified upon rehearing in D.05-01-035.

## Comments on Draft Decision

The Draft Decision of Administrative Law Judge Thomas R. Pulsifer in this matter was mailed to the parties in accordance with Section 311(g)(1) of the Pub. Util. Code and Rule 77.7 of the Rules of Practice and Procedure. Comments were filed on February 14, 2005, and reply comments on February 22, 2005. We have taken the comments into account, as warranted in finalizing this order.

## Assignment of Proceeding

Geoffrey F. Brown is the Assigned Commissioner and Thomas Pulsifer is the assigned Administrative Law Judge in this proceeding.

## Findings of Fact

1. In D.03-04-030, the Commission established policies and rules governing the applicability of CRS obligations to bundled service customers that depart to "Customer Generation" or self-generation.

2. D.03-04-030 was silent on the question of whether DA customers that move to self-generation must still pay the power charge component of the CRS obligation.

3. To the extent that a CRS undercollection liability is created while the customer uses the DA option, such liability is not eliminated when the customer subsequently migrates either to bundled service or to self generation.

4. DA cost responsibility is predicted on whether power supplies were *procured* on behalf of a given customer load, even if the supplies were not actually *consumed* by that load.

5. DWR power was purchased to serve *all* of the customers on bundled service at the time of DWR's purchasing activities, including those that subsequently migrated to DA.

6. While customers migrating from DA to self generation remain responsible for their share of past DA CRS undercollections incurred during the period that they were on DA, such customers do not contribute to ongoing CRS power charges after they migrate to self generation and otherwise qualify as part of the 3,000 MW of excluded load.

7. No impermissible cost shifting results if those customers no longer pay a DA CRS component for ongoing power charges attributable to the period after the customer's migration to self generation.

8. The migration of a customer from DA to self generation has no effect on their preexisting CRS obligations to pay off their share of past undercollections of the DWR power charge.

## Conclusions of Law

1. The CMTA/CLECA petition to modify should be resolved in a manner consistent with the Commission's prohibitions against impermissible cost shifting as prescribed by AB 117.

2. If a DA customer migrates to CGDL without paying its fair share of AB 117 costs, such costs would be unfairly shifted to other customers, since the IOU cannot recoup such above-market costs in the marketplace.

3. DA customers that migrate their load to customer generation should continue to pay for past undercollections of CRS liabilities attributable to the period prior to the DA customer's migration of load to self-generation.

4. Selective forgiveness of past costs for one group of DA customers and not for a similarly situated group, as Petitioners propose, would constitute unlawful discrimination and cost shifting.

5. It is reasonable not to require a customer migrating from DA to self generation to pay an ongoing DWR power charge associated with prospective costs to the extent that customer qualifies as part of the first 3,000 MW of excluded load pursuant to D.03-04-030.

6. DA customers migrating to customer generation should not be relieved of their previously accrued share of the DA CRS undercollection attributable to the period before their migration.

7. Since "continuous" DA customers do not pay a DWR power charge, they are not impacted by the CLECA/CMTA proposed modification.

8. CGDL requirements for tail CTC have previously been set forth in D.03-04-030, and implemented by Commission Resolution E-3831, as further modified upon rehearing in D.05-01-035.

9. The Petition for Modification should be granted to the limited extent set forth in Ordering Paragraphs 1 and 2 below.

## O R D E R

**IT IS ORDERED** that:

1. The Petition to Modify Decision (D.) 03-04-030, filed by California Large Energy Consumers Association (CLECA) and California Manufacturers and Technology Association (CMTA) is granted, in part, and denied, in part, to the limited extent set forth in Ordering Paragraph 2.

2. D.03-04-030 is hereby modified to affirm the cost responsibility applicable to customers that migrate from direct access (DA) to Customer Generation Departing Load. To the extent such migration occurs, the Customer Generation customer will not be required to pay a Cost Responsibility Surcharge (CRS) provision for prospective power charges to the extent that it otherwise qualifies as part of the first 3,000 megawatts of excluded load. Such customer generation shall still remain responsible for its share of cumulative CRS undercollections that accrued while the customer was being served on a DA basis. Such customer migrating to self generation shall also continue to be responsible for the Department of Water Services Bond Charge on the same basis as before the migration.

This order is effective today.

Dated _____, at San Francisco, California.